TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement of the Case	3
Reasons Why the Writ Should Be Granted	7
The Court Below Failed to Make Required Findings of Fact and Conclusions of Law	7
There Was No "Probable Cause" or "Reasonable Grounds" for the Arrest of Petitioner	10
Appendix A	
Robert F. Hinton v. U. S., No. 14455, U. S. Court of Appeals, D. C. Circuit, Decided December 9, 1958	1a

CASES CITED

Brinegar v. United States, 338 U.S. 160, 69 S. Ct., 1302	12
Carroll v. United States, 267 U.S. 132	8
Draper v. United States, No. 136, October Term, 1958, Decided January 28, 1959	7, 14
Johnson v. United States, 333 U.S. 10, 68 S. Ct. 367	15
Maghan v. Jerome, 67 App. D.C. 9, 88 F. 2d 1001	8
McKnight v. United States, 87 U.S. App. D.C. 151, 183 F. 2d 977	15
Mills v. United States, 196 F. 2d 600	10
United States v. Di Re, 332 U.S. 581, 68 S. Ct. 222	10
United States of America v. Robert F. Hinton, 161 F. Supp. 266	1

STATUTES AND RULES

District of Columbia Code, 1951 Ed.	
§ 4-139	8
§ 33-414	8

Page

Federal Rules of Civil Procedure
Rule 52(a) 9

Judicial Code 26 U.S.C. (Supp. V)
§ 7607 ..... 2, 7

Judicial Code 28 U.S.C.
§ 1254(1) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. (

ROBERT F. HINTON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Robert F. Hinton prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in this cause on December 4, 1958.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It appears as Appendix A hereto, infra, p. 1a. The opinion of the United States District Court for the District of Columbia is reported as *United States of America* v. *Robert F. Hinton,* 161

F. Supp. 266 and appears at page 6 of the Record filed with this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28 of the United States Code. The judgment of the Court of Appeals was entered on December 4, 1958. Petition for rehearing was denied on January 13, 1959.

QUESTIONS PRESENTED

1. When a United States Court of Appeals disapproves the findings of facts and conclusions of law of a United States District Court must it itself make substitute findings and conclusions?

2. Is the observation of a man doing things which admittedly give no cause for arrest coupled with unverified information furnished by informers that six months previously he had been seen in the company of persons suspected of dealing in narcotics "reasonable grounds" and "probable cause" for his arrest?

STATUTE INVOLVED

26 U.S.C. (Supp. V) § 7607

"The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401(1)), may—

* * *

"(2) make arrests without warrant for violations of any law of the United States relating to

narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

STATEMENT OF THE CASE

Petitioner was arrested under the following facts and circumstances.

At about 10:30 p.m. on August 7, 1957, Agents Thompson and Wilson of the Federal Bureau of Narcotics had under surveillance one Forest McAbee a suspected narcotics violator. The officers observed McAbee drive to petitioner's home, pick up petitioner and return to 7th and S Streets, N.W., a point in downtown Washington, D. C. McAbee parked the automobile and departed accompanied by petitioner. Sometime later in the evening Petitioner was observed to return alone, enter McAbee's automobile and drive approximately fifteen blocks to Georgia and Lamont Streets, N.W. He there parked and left the automobile and entered Bannister's Delicatessen, a small grocery store. Petitioner's actions while in the store were not observed. He remained therein not more than two minutes after which he was seen to walk around the corner and enter 648 Lamont Street, N.W., the home of Joseph Davis a suspected dealer in narcotics. Petitioner's actions while in Davis' home were not observed. He remained therein about five minutes after which he returned to the automobile and drove it approximately 15 blocks back to 7th and S Streets, N.W. The police followed in an unmarked government vehicle. When Petitioner stopped for a red

light the officers drew alongside and Agent Thompson "left the vehicle [he] was in and entered the right hand door of the vehicle the [Petitioner] was in". (R. 15) The officer did not, before opening the automobile door, notify petitioner of his purpose or authority for entering the vehicle. The time was shortly after midnight on August 8, 1957. In obedience to the officer's commands petitioner drove his vehicle to the curb, got out and stood with raised hands while his person was searched. The search revealed six capsules which were later proved to contain a narcotic drug. There was no warrant for petitioner's arrest.

The foregoing constitute all of the facts and circumstances known to the arresting officers through the testimony of their senses on the night of the arrest.

The Government has not seriously contended that the things done and places visited by petitioner would, in and of themselves, constitute probable cause for his arrest. It therefore seeks to couple these with the following matters in an effort to spell out probable cause.

In December 1956, eight months prior to petitioner's arrest, Agents Thompson and Wilson were investigating the activities of Joseph Davis, Forest McAbee and others not including petitioner suspected of being engaged in the narcotics traffic. During the investigation Agent Thompson, the arresting officer, had seen petitioner in the company of Davis once.[1] The rest of his and Agent Wilson's information about him came primarily from one Charles Harden, an informer, who was being used in the investigation as an undercover

[1] See footnote 3, *infra*, page 11.

agent. Harden had reported[2] that on two occasions in December, 1956, he had purchased narcotics from Davis and that on the first occasion he had later given one of the capsules he purchased to petitioner.

In other reports Harden had stated that on December 27, 1956 he had, upon request, been told by petitioner the location of the home of Odessa Madre, a suspected point of sale for narcotics, that on January 5, 1957 he had, in the presence of petitioner, purchased narcotics from an unknown person and that Davis lived at 648 Lamont Street, N.W.

During this investigation eight months prior to petitioner's arrest an anonymous informer, upon whose identity and reliability there is no evidence in the record, advised the agents that Davis sold narcotics from the Lamont Street premises and that a proposed customer could obtain admittance by first calling the house by telephone from Bannister's Delicatessen and then walking to the premises. Beginning on February 25, 1957 the police placed 648 Lamont Street under surveillance and observed it off and on over a period of six months. This surveillance revealed only that someone sat behind the front door in the after dark hours and that on May 20, 1957 the police observed Davis and certain unknown persons on and about the premises. At no time during the six [illegible] surveillance was anyone seen or suspected to obtain admittance to the premises by first making a tele[illegible]om Bannister's Delacatessen.

[2] Harden did not testify at petitioner's trial. [illegible] information concerning the late 1956 and early 1957 investigation had been reduced to writing and made a part of a file which was used at the trial by Agents Thompson and Wilson to refresh their recollections.

Agent Wilson, who was present at but did not participate in the arrest of petitioner, testified at the trial that in March, 1957, approximately five months before the arrest, he had been informed by one Pearl Woodward that she and petitioner were living together and engaged in narcotic traffic. Pearl Woodward was called by the defense and denied making such a statement. Agent Wilson further testified that he had learned from an informer he did not identify, that in March, 1957 petitioner belonged to a club called the Wasters, and that meetings were held at which narcotics were used.

Agent Fialkewicz, of the Baltimore office of the Federal Bureau of Narcotics, although not present at the arrest, was permitted to testify at petitioner's trial that Harden, in his presence, had on December 22, 1956 telephoned Davis; that what he characterized as a "coded" conversation ensued, and that Davis mentioned that he had that day "stayed around" with petitioner. There is no indication that the facts testified to by Agent Fialkewicz were known to either Agent Thompson or Agent Wilson before they arrested petitioner.

Finally, at the trial Agent Thompson, the arresting officer, testified on cross-examination as follows (R. 35):

"Q. Now, Agent Thompson, I ask you was it your purpose at the time you seized the automobile to arrest the defendant or to seize the automobile?

"A. My purpose was both, to seize the automobile and to arrest the defendant.

"Q. Now, what were you going to arrest the defendant for?

"A. I was going to arrest the defendant to find what he had been doing at 648 Lamont Street, Talk to him.

"Q. In other words, you arrested the defendant in order to search him, did you not?

"A. I did."

The District Court, in a Memorandum Opinion, found as a matter of fact and law that there was probable cause for petitioner's arrest. On appeal the Court of Appeals affirmed the judgment of conviction. In so doing it disapproved the District Court's findings and conclusions on the issue of probable cause, concluding "on the basis of our own reading of the record, rather than on the District Court's findings" that there was probable cause. The Court of Appeals gave no indication whatever of the basis for its conclusion.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Court Below Failed to Make Required Findings of Fact and Conclusions of Law

In *Draper* v. *U. S.*, No. 136, October Term, 1958, decided January 28, 1959 this Court had occasion to review at length the fundamental law governing arrests without warrant by agents of the Bureau of Narcotics. Here as in *Draper* petitioner seeks certiorari on the ground that the search and seizure of his person violated the Fourth Amendment of the Constitution of the United States and therefore the use in evidence of the narcotics illegally seized vitiates his conviction. Here, as in *Draper*, the crucial question for decision is whether at the moment of the arrest the officer had "probable cause" within the meaning of the Fourth Amendment, and "reasonable grounds" within the meaning of 26 U.S.C. (Supp. V) § 7607

to believe that petitioner had committed or was committing a violation of the narcotics laws.

This issue is a mixed question of law and fact, *Maghan* v. *Jerome*, 67 App. D. C. 9, 88 F. 2d 1001, to be resolved by a court and not by a jury. It requires for its determination a finding of: (1) the particular facts and circumstances within the officers' knowledge and belief; and (2) a conclusion that such facts and circumstances are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *Carroll* v. *United States*, 267 U.S. 132. Thus a determination of the ultimate question of whether or not probable cause exists always requires findings of facts. This is true whether the issue be before a magistrate for the issuance of an arrest warrant or before the courts when no warrant was issued. The District of Columbia Code provision covering the execution of arrest warrants is silent upon the necessity for findings of fact by the issuing magistrate. See Section 4-138, D.C. Code 1951 Ed. However, the true intent of the legislation can be found in Section 33-414 of the D.C. Code covering the issuance of search warrants under the Uniform Drug Act. Section (b) thereof requires that "A search warrant cannot be issued but upon probable cause suported by affidavit . . ." and Paragraph (d) provides that such "affidavit or deposition must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist." This is followed by Paragraph (e) requiring that if the judge or U.S. Commissioner issing the warrant is satisfied of the existence of the grounds of the application or that there is probable cause, he must issue a search warrant" . . . *stating the particular*

grounds or probable cause for its issue . . ." (Emphasis supplied).

Rule 52(a) of the Federal Rules of Civil Procedure requires findings of fact and conclusions of law to be made by the trial court in order: (1) to enable the appellate court to determine the grounds upon which the trial court reached its decision; (2) to enable the defeated party to determine whether the case presents a question worthy of consideration by the appellate court; and (3) to spare the appellate court the necessity of searching the record in order to supply findings of fact.

These fundamental reasons required the Court of Appeals to make findings in this case, for that Court substituted itself for the trial court by determining the issue of the legality of the arrest *de novo*. It must therefore make specific findings of facts and conclusions of law in substitution for those made by the trial court. The Court's opinion acknowledged that the trial court erred in its conclusions because certain post arrest happenings were taken into consideration in arriving at the decision that probable cause existed. Petitioner had argued just this point and was obviously correct. Petitioner had also advanced the argument, *inter alia*, that absolutely no weight could be given to the alleged "pattern" of Petitioner's activities on the night of the arrest. The thrust of that argument was that no weight could be given to the alleged "pattern" because the police had neither knowledge nor reasonable belief that it in fact existed. However, neither this Court nor Petitioner can determine from the Court's brief opinion whether or not that alleged "pattern" was taken into consideration in arriving at the Court's ultimate conclusion. In fact,

neither this Court nor Petitioner is able to determine from the opinion whether or not any of his contentions on the facts or the law, other than those dealing with post arrest happenings, were considered and passed upon by the Court of Appeals.

It is clear that the Court of Appeals ignored the findings of fact and conclusions of law made by the trial court. It stated in no uncertain terms that "We reach this conclusion on the basis of our own reading of the record, rather than on the District Court's findings." (Slip Opinion, page 2). Obviously, therefore, Petitioner is entitled to and the Court of Appeals should have stated its independent finding of facts and conclusions of law. It follows that this Court should summarily and forthwith grant certiorari, reverse the judgment below and remand the cause to the Court of Appeals for findings of fact and conclusions of law. The only alternative, and obviously a much less desirable one, is for this Court itself to consider the record *de novo*.

There Was No "Probable Cause" or "Reasonable Grounds" for the Arrest of Petitioner

This is not a case involving the successful apprehension of a suspect after careful police investigation and surveillance over a period of time. Cf. *Mills* v. *United States*, 196 F. 2d 600. Petitioner was arrested less than 45 minutes after first being seen to drive McAbee's automobile. The observation of him for this brief period was made because of the pure happenstance that he used McAbee's car rather than because the police had any knowledge or belief that he had ever in the past committed, or was then commiting or would in the future commit a crime. It is patently

ridiculous to suppose that on the night of August 7, 1957, while sitting in their automobile, Agents Thompson and Wilson recalled the details of the reports made by the informer Harden more than seven months previously. Assuming however that their memory served them well, the best that can be said of the information in the reports is that the informer knew petitioner to be an acquaintance of persons engaged in the narcotic traffic. The only information had by the police, independent of the reports of others, was of the same equivocal type, namely that petitioner had once been seen with Davis.[3]

The trial court seemed to place particular reliance on the alleged "pattern" of activity followed by petitioner, i.e., entering Bannister's Delicatessen, remaining a few moments and then entering 648 Lamont Street. It was this so-called "pattern" coupled with other information in the minds of the officers that apparently convinced it that the arresting officer acted reasonably. Whether the Court of Appeals agreed it erroneously failed to say. But the entire basis for attaching any significance to that "pattern" was the clearly erroneous finding by the trial court that "After *careful surveillance,* the police learned that the method of gaining entrance to 648 Lamont Street was first to go into Bannister's, a delicatessen near the house, and place a phone call." (Emphasis supplied). (R. 7). The evidence is absolutely clear that information as to the alleged pattern had come to the police, not as a result of surveillance, but from the report of one

[3] This fact is in doubt. Agent Thompson, testifying from memoranda indicated that, according to the written report, he had once seen petitioner with Davis. On cross-examination he stated that he had never seen petitioner in the company of Davis. (R. 22, 33).

unidentified informer. Not only was there no evidence of his reliability or trustworthiness introduced, but the surveillance of the police began after they had been told of the "pattern" failed to disclose its existence. The Lamont Street premises were placed under surveillance in February 1957 and observed off and on for a period of about six months. At no time during this period was anyone seen or suspected to have followed the "pattern" to gain admittance to the premises. In fact throughout the entire period of the surveillance of the suspected premises no sales of narcotics were observed, no arrests were made and no attempt was made to search the house. Clearly whatever weight might have been initially accorded the informer's story of the alleged "pattern" it was dissipated by the passage of a long period of time during which every opportunity and effort to test and confirm its reliability failed.

This case is to be contrasted with *Brinegar* v. *United States*, 338 U.S. 160, 69 S. Ct. 1302, in which this Court discussed the "troublesome line . . . between mere suspicion and probable cause." There the arresting officers were parked in a car beside an Oklahoma highway close to the Missouri-Oklahoma border. Missouri was *known* to the officers to be a *legal* source of liquor, whereas Oklahoma was a "dry" state and forbade its transportation. Brinegar drove past the officers in a direction heading into Oklahoma from Missouri. One of the arresting officers had arrested Brinegar five months earlier; had personally seen him loading liquor into the same automobile on at least two occasions during the preceding six months; knew him to have a reputation for hauling contraband; recognized both him and the automobile; and finally ob-

served that the vehicle was "heavily loaded and weighted down with something". After a short chase Brinegar was stopped, arrested, searched and contraband found. Both the trial court and the Court of Appeals held that the prior knowledge of the officers and the circumstances at the moment of arrest were not sufficient to lead a reasonably discreet and prudent person to believe that intoxicating liquor was being transported in the coupe, and did not constitute probable cause for a search.

The Court disagreed because in addition to knowing of Brinegar's hearsay reputation the arresting officer had *personal knowledge* of prior illegal conduct and *observed* at the time of the arrest that the accused was driving a heavily loaded car from the direction of a known legal source of supply. In answer to the argument that the arresting officer's knowledge that Brinegar was engaged in illicit liquor running rested wholly or largely on surmise or hearsay, this Court said:

> "There was hearsay, but there was much more. Indeed, as we have emphasized, the facts derived from Malsed's personal observations were sufficient in themselves, without the hearsay concerning the illegal character of Brinegar's operations."

In contrast, this case presents hearsay and no more. Petitioner had no reputation for criminal activity. There was only the report of one informer that he was an *acquaintance* of suspected narcotic violators. The alleged "pattern" into which petitioner supposedly fell was not personally known to exist. On the contrary efforts over a long period of time to confirm its existence had failed. Davis' home at 648 Lamont Street was not a *known* source of supply as was the

State of Missouri in *Brinegar*. On the contrary, more than six months surveillance had failed to confirm hearsay accusations that those premises were used for illegal purposes. Everything petitioner did on the night of his arrest was as consistent with lawful as with unlawful conduct. In such circumstances there is no probable cause for arrest.

The *Draper* Case, supra, does not affect the distinction between this case and *Brinegar*. In *Draper* the hearsay information of the informer was that within two or three days a particularly described person would be *committing* a particular *crime* in a particular way at a particular time and a particular place. As this Court found, the arresting officer "personally verified every facet of the information given him by [the informer] except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of [the informer's] information being thus personally verified, [the arresting officer] had 'reasonable grounds to believe that the remaining unverified bit of . . . information—that Draper would have the herion with him—was likewise true." Here there was no information that a crime would be or had been committed by petitioner. The information concerning possible illegal activities of petitioner's acquaintances or at places visited by him on the night of his arrest had come to the police more than six months previously and determined efforts to verify it had failed.

The *Draper* arrest was sustained only because the police personally observed and verified the reliability of every facet of the hearsay information except the ultimate fact of the commission of the crime. The *Brinegar* arrest was sustained because in addition to

hearsay the arresting officer had personal knowledge of the accused's illegal activities and the facts observed at the time of the arrest coincided exactly with his known methods of conducting those activities. Here there was absolutely no verification of hearsay information and the arresting officer had no personal knowledge of any fact which could reasonably lead a prudent man to believe that petitioner was committing a crime.

The testimony of Agent Thompson makes it absolutely clear that he was following the infamous and often condemned practice of "arrest for investigation". He testified that he arrested petitioner "to find what he had been doing at 648 Lamont Street. Talk to him." (R. 35). Of course it was no crime to be in those premises. This, his own characterization of his own motive and intent, reveals that he did not believe, reasonably or otherwise, that petitioner had committed, was committing, or was about to commit a crime. It certainly forecloses any finding that he had probable cause for so believing. At another point in his testimony Officer Thompson candidly admitted that he arrested petitioner in order to search him. (R. 35). In other words, the search and not the arrest was the real object of the officer. The arrest was a pretext for or at most an incident of the search. Therefore neither the arrest nor the search is reasonable within the meaning of the Constitution. *McKnight* v. *United States*, 87 U.S. App. D.C. 151, 183 F. 2d 977; see also, *Johnson* v. *United States*, 333 U.S. 10, 68 S. Ct. 367; *United States* v. *Di Re*, 332 U.S. 581, 68 S. Ct. 222. As this Court put it in the *Di Re* case, "... a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success."

Under the facts and circumstances here it is clear that there was no probable cause or reasonable ground to believe that petitioner was committing a violation of the law at the time he was arrested. The arrest was therefore unlawful and the subsequent search and seizure equally unlawful. It follows that petitioner's motion to suppress should have been granted and that the narcotic drug seized from his person was improperly received in evidence at his trial.

WHEREFORE, Petitioner prays that this petition for a writ of certiorari be granted, that the judgment of the Court of Appeals be reversed, and that the cause be remanded to it with directions to remand it to the District Court for the entry of judgment of acquittal.

Respectfully submitted,

BRYCE REA, JR.
DONALD E. CROSS
Munsey Building
1329 E Street, N. W.
Washington 4, D. C.
Counsel for Petitioner

Of Counsel:
EDGAR WATKINS
GORDON ALLISON PHILLIPS
919 Munsey Building
Washington 4, D. C.

February 12, 1959